

ROBERT E. FENNELL
CLAIR B. COLBURN
d.b.a. COLFENSCH MINING ASSOCIATION

IBLA 81-96

Decided July 8, 1981

Appeal from decision of Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. M MC 46764 through M MC 46813.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment -- Mining Claims: Assessment Work -- Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of an unpatented mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply conclusively constitutes an abandonment of the claim by the owner and renders the claim void.

2. Administrative Procedure: Adjudication -- Evidence: Generally -- Evidence: Presumptions -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment -- Mining Claims: Assessment Work -- Mining Claims: Recordation

Although at common law, abandonment of a mining claim can be established only by

evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.

3. Administrative Authority: Generally -- Federal Employees and Officers: Authority to Bind Government

Reliance upon erroneous or incomplete information provided by Federal employees does not create any rights not authorized by law.

4. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Where a mining claimant believes that assessment work would be a prohibited or useless act, the claimant should file a notice of intention to hold pursuant to 43 CFR 3833.2-3.

APPEARANCES: John P. Wilkes, Esq., Fort Lauderdale, Florida, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Robert E. Fennell and Clair B. Colburn, d.b.a. Colfensch Mining Association, have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated September 29, 1980, declaring their mining claims, M MC 46764 through M MC 46813, abandoned and void for failure to file timely evidence of annual assessment work or notices of intention to hold the claims pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and its implementing regulations, 43 CFR Subpart 3833.

All of appellants' mining claims were located between November 11, 1954, and February 15, 1955. See Appendix A. They were filed for recordation with BLM on October 15, 1979. There is no evidence that appellants filed either evidence of annual assessment work or notices of intention to hold the claims with BLM.

Appellants make a number of arguments in their statement of reasons for appeal, namely: (1) recordation of the mining claims with the county and with BLM raises a presumption of an intention not to abandon the claims; (2) appellants relied on a published notice informing mining claimants of the need to record their notices or certificates of location, but making no mention of the need to file either evidence of annual assessment work or notices of intention to hold the claims; (3) the conclusive presumption of abandonment set forth in 43 CFR 3833.4 is not within the scope of congressional intent as set out in the Act of September 28, 1976, 16 U.S.C. § 1901 (1976); 1/ (4) the conclusive presumption of abandonment set forth in 43 CFR 3833.4 results in the taking of a property right without due process of law; and (5) BLM is estopped to declare the mining claims abandoned and void because of uncertainty, generated in part by BLM, surrounding whether the claims are within a game refuge withdrawn from the operation of the mining laws, thereby making it "impossible for the appellants to determine the validity of their claim[s] or their ability to perform the necessary assessment work." 2/

[1] Section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), provides in relevant part that the owner of an unpatented mining claim "located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter" file either an affidavit of assessment work or a notice of intention to hold the mining claim. The applicable regulation, 43 CFR 3833.2-1(a), implements the statutory provision.

Section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), provides the penalty for failure to satisfy the filing requirement of section 314(a) of FLPMA, supra, that is, "it shall be deemed conclusively to constitute an abandonment of the mining claim." Similarly, the applicable

1/ The Act of Sept. 28, 1976, supra, is expressly made applicable to mining activity in the national parks. There is no evidence that the subject land is within a national park. In fact, the documents submitted by appellants indicate that it is within the Custer National Forest. Accordingly, appellants' citation to the Act of Sept. 28, 1976, supra, is inappropriate.

2/ Appellants have submitted numerous documents indicating the establishment of a game refuge pursuant to Presidential proclamation, Feb. 2, 1925 (43 Stat. 1985), and efforts to revoke the withdrawal in the late 1960's.

regulation, 43 CFR 3833.4(a), provides: "The failure to file an instrument required by §§ 3833.1-2 (a), (b) and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void." (Emphasis added.)

Since all the claims in question were located prior to October 21, 1976, either affidavits of assessment work or notices of intention to hold the claims were required to be submitted to BLM on or before October 22, 1979, as required by statute and regulation. 43 U.S.C. § 1744(a) (1976); 43 CFR 3833.2-1(a). This requirement is mandatory and failure to comply constitutes an abandonment of the claim by the owner and renders the claim void. 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a). Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 371 (1981); James V. Brady, 52 IBLA 361 (1980).

Appellants' challenge to the statutory and regulatory conclusive presumption of abandonment cannot be sustained by this Board. To the extent that the regulations have been considered by the courts, they have been upheld. See Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981); Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), *aff'd*, Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir. May 21, 1981); Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). Moreover, an appeals board of this Department has no authority to declare a duly promulgated regulation invalid. Lynn Keith, *supra*, and cases cited therein. In addition, the Department of the Interior, being an agency of the executive branch of Government, is not the proper forum to decide whether an Act of Congress is unconstitutional. Id. at 198, 88 I.D. at 372.

[2] Filing of evidence of annual assessment work or a notice of intention to hold a mining claim is a mandatory requirement. The burden is on a mining claimant merely to show compliance with all of the filing requirements of FLPMA. Extraneous evidence indicating an intention not to abandon a claim, including recordation of the claim with the county and with BLM, cannot be considered in light of the statutory conclusive presumption of abandonment which results from the failure to file an instrument required by 43 U.S.C. § 1744 (1976). The matter is governed by statute and not by common law. See Lynn Keith, *supra* at 196-97, 88 I.D. at 372.

[3] Moreover, appellants cannot rely on inadequate or incomplete information supplied in BLM publications. As we stated in Lynn Keith, *supra* at 198, 88 I.D. at 372-73:

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Edward W. Kramer 51 IBLA 294 (1980).

Therefore, reliance upon erroneous or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed by statute, or create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements. Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1970).

[4] Finally, appellants cannot rely on the alleged uncertainty regarding the status of the subject land to justify the failure to comply with the filing requirements. If appellants believed that assessment work was a prohibited or useless act, 3/ they should have submitted notices of intention to hold the mining claims, indicating their reasons for not performing annual assessment work. See 43 CFR 3833.2-3. Not having filed either evidence of annual assessment work or notice of intention to hold, appellants will not be heard to argue that BLM improperly invoked the applicable statutory and regulatory provisions in declaring the claims abandoned and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

3/ Performance of annual assessment work is expressly required by statute. 30 U.S.C. § 28 (1976). Absent a legal suspension or deferment, a claimant's obligation to perform annual assessment work has been recognized by the Supreme Court. Hickel v. Oil Shale Corp., 400 U.S. 48 (1970); see United States v. Bohme, 48 IBLA 267 (1980). For a thorough discussion of the interpretive problems presented by the notice of intention to hold regulation, 43 CFR 3833.2-3, see Alaskamin Co., 49 IBLA 49 (1980), as supplemented by Order, 49 IBLA 49A (1981).

APPENDIX A

<u>Claim Name</u>	<u>Serial Number</u>	<u>Location Date</u>
Dot Number One	M MC 46764(SD)	11-11-54
Dot Number Six Fraction	M MC 46770(SD)	1-02-55
Dot Number Seven	M MC 46771(SD)	11-13-54
Dot Number Eight	M MC 46772(SD)	1-02-55
Dot Number Nine	M MC 46773(SD)	11-20-54
Dot Number Ten	M MC 46774(SD)	11-20-54
Dot Number Eleven	M MC 46775(SD)	11-11-54
Dot Number Twelve	M MC 46776(SD)	1-02-55
Dot Number Thirteen	M MC 46777(SD)	1-02-55
Dot Number Fourteen	M MC 46778(SD)	11-28-55
Dot Number Fifteen	M MC 46779(SD)	1-02-55
Dot Number Sixteen	M MC 46780(SD)	1-02-55
Dot Number Seventeen	M MC 46781(SD)	1-02-55
Dot Number Eighteen	M MC 46782(SD)	11-28-54
Dot Number Nineteen	M MC 46783(SD)	1-02-55
Dot Number Twenty	M MC 46784(SD)	1-02-55
Dot Number Twenty-one	M MC 46785(SD)	1-02-55
Dot Number Twenty-two	M MC 46786(SD)	1-02-55
Dot Number Twenty-three	M MC 46787(SD)	1-02-55
Dot Number Twenty-four	M MC 46788(SD)	1-02-55
Dot Number Twenty-five	M MC 46789(SD)	1-02-55
Dot Number Twenty-six	M MC 46790(SD)	1-02-55
Dot Number Twenty-seven	M MC 46791(SD)	1-02-55
Dot Number Twenty-eight	M MC 46792(SD)	1-02-55
Dot Number Twenty-nine	M MC 46793(SD)	1-08-55
Dot Number Thirty-six	M MC 46794(SD)	2-03-55
Dot Number Thirty-two	M MC 46795(SD)	1-09-55
Dot Number Thirty-three	M MC 46796(SD)	1-09-55
Dot Number Thirty-four	M MC 46797(SD)	1-09-55
Dot Number Thirty-five	M MC 46798(SD)	1-08-55
Dot Number Thirty-seven	M MC 46799(SD)	2-03-55
Dot Number Thirty-eight	M MC 46800(SD)	2-03-55
Dot Number Thirty-nine	M MC 46801(SD)	2-04-55
Dot Number Forty	M MC 46802(SD)	2-04-55
Dot Number Forty-one	M MC 46803(SD)	2-03-55
Dot Number Forty-two	M MC 46804(SD)	2-03-55
Dot Number Forty-seven	M MC 46805(SD)	1-09-55
Dot Number Forty-eight	M MC 46806(SD)	1-09-55
Dot Number Forty-nine	M MC 46807(SD)	1-09-55
Jeep Number One	M MC 46808(SD)	2-05-55
Jeep Number Two	M MC 46809(SD)	2-05-55
Jeep Number Three	M MC 46810(SD)	2-05-55
Kay Number One	M MC 46811(SD)	2-15-55
Kay Number Two	M MC 46812(SD)	2-15-55
Kay Number Three	M MC 46813(SD)	2-15-55